therefore derive any title to the premises and cannot claim to be in the same position as a statutory tenant.

The counsel also contended that the affidavit does not state the premises is rent-controlled. The basis of the original claim is that the premises was licenced to the defendant and this had been conceded and it is most unreasonable to suggest that the affidavit by applicant should state that the premises is rent-controlled just because the respondents now contend that it is so in their affidavit in opposition.

(6) Lastly, the respondent's counsel argued that there are triable issues as shown in the respondent's affidavit in opposition and the writ should not issue.

In my view, the purpose of notice in rule 2 of Order 47 of Rules of Supreme Court is to enable the persons in possession to apply for relief e.g. against forfeiture of lease if there has been any or otherwise. The intention is not to decide whether a triable issue has been raised which had already been dealt with before judgment or order was obtained.

(7) In my judgment the respondent's affidavit had no merit. As conceded by their counsel the affidavit merely consists of supposition that the premises was rent-controlled and that by virtue of section 18(c) of Rent Control Ordinance (Cap. 86) they become statutory tenants. As has been stated earlier both respondents have no title to remain in possession of the premises and in these circumstances leave was granted for writ of possession to issue against both respondents.

*Application allowed.*

Solicitors: *Yong & Co.; Reddy & Co.*

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## MARZUKI BIN MOKHTAR v. PUBLIC PROSECUTOR

**[A.Cr.J. (Tan Chiaw Thong J.) January 16, 1979]**
**[Sibu — Criminal Appeal No. 7 of 1978]**

*Criminal Law and Procedure — Charge of possession of heroin — Ruling that there was a case to answer — Appeal against decision — Preliminary objection to appeal — Ruling not "judgment" or "order" — Scope of s. 307(1) of Criminal Procedure Code — Dangerous Drug Regulations, r. 6(3) — Criminal Procedure Code, ss. 173(f), 180 & 307(i).*

The appellant in this case appealed against the decision of the lower court which ruled that there was a case for the appellant to answer on the charge for which he was tried after the submission by his learned counsel at the end of the case for the prosecution that there was no case to answer. The appellant was charged with having possessed a quantity of heroin, an offence under regulation 6(3) of the Dangerous Drug Regulations. At the outset the learned Deputy Public Prosecutor raised a preliminary objection to the appeal on the ground that the appeal was premature and did not fall within the ambit of section 307(i) of the Criminal Procedure Code.

**Held:** (1) a ruling made at the end of the case for the prosecution in a criminal trial that there is a case for the accused to answer on the charge or charges against him is not a judgment within the contemplation of section 307(i) of the Criminal Procedure Code;

(2) the word "judgment" in criminal proceedings indicates the final order in a trial terminating in the conviction or acquittal of the accused; therefore the instant appeal does not concern a judgment falling within the ambit of section 307(i) of the Criminal Procedure Code;

(3) the instant appeal had been brought prematurely and it was not competent for the court to deal with such appeal on its merits;

(4) the trial should continue from the stage where it left off, before the successor of the magistrate who initially heard the trial and who had since left the service;

*Cases referred to:-*

(1) *Public Prosecutor* v. *Hoo Chang Chwen* [1962] M.L.J. 284.

(2) *Public Prosecutor* v. *R.K. Menon & Anor.* [1978] 2 M.L.J. 152.

CRIMINAL APPEAL.

*David Tiong* for the appellant.

*Mustapha Besar* (Deputy Public Prosecutor) for the respondent.

**Tan Chiaw Thong J.:** This is an appeal against the decision of the lower court which ruled that there was a case for the appellant to answer on the charge for which he was tried by the lower court after the submission by his learned counsel at the end of the case for the prosecution that there was no case for him to answer. The appellant was charged with having possessed a quantity of heroin which was a dangerous drug without being authorised, an offence punishable under regulation 6(3) of the Dangerous Drug Regulations.

At the outset of this appeal the learned Deputy Public Prosecutor raised a preliminary objection to the appeal on the ground that the appeal, having been brought at the stage of proceedings before the lower court described above, is premature and in any event, that it is not such an appeal as falls within the ambit of section 307(i) of the Criminal Procedure Code. The relevant part of section 307(i) of the Criminal Procedure Code provides that any person who is dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against such judgment, sentence or order in respect of any error in law or in fact or on the ground of the alleged excessive severity or of the alleged inadequacy of any sentence. There is no question here of any sentence of the lower court being in issue since the trial has not been concluded. The question that falls for consideration is whether the instant appeal is one against a judgment or order of the lower court. In my opinion a ruling made at the end of the case for the prosecution in a criminal trial that there is a case for the accused to answer on the charge or charges against him is not a judgment within the contemplation of section 307(i) of the Criminal Procedure Code. In this connection, the word "judgment" is not defined in the Code but in the Commentaries on the Code of Criminal Procedure 1973 by *Sarkar*, in dealing with the matter of judgment in a trial under section 353 of the Indian Code of Criminal Procedure, it was stated at page 823 that the word "judgment" in criminal proceedings indicates the final order in a trial terminating in the conviction or acquittal of the accused. I would respectfully adopt the definition of

judgment therein defined for the purposes of the instant appeal. I would therefore hold that the instant appeal does not concern a judgment falling within the ambit of section 307(i) of the Criminal Procedure Code. The other matter that remains to be considered is whether the appeal relates to an "order" made by the lower court within the contemplation of that section. In this connection, quite apart from statutory provisions, it is commonly understood that in a criminal trial, after the close of the case for the prosecution against the accused, the accused or his counsel is entitled to submit that there is no case for the accused to answer on the charge or charges against him at that stage of the proceedings against him. After hearing arguments on such a submission, it would then fall upon the trial court to make a ruling as to whether the prosecution has made out a *prima facie* case against the accused. If so, the accused would be called upon to answer the charge or charges against him. On the other hand, if the court rules otherwise, then the accused at that stage is entitled to be acquitted and discharged. In the instant appeal, the learned trial magistrate ruled that there was a case for the accused to answer whereupon learned counsel for the accused intimated that he wished to appeal against the decision of the trial magistrate who gave leave for appeal. As stated earlier, quite apart from statutory provisions, it seems clear to my mind that an appeal brought under those circumstances would be an appeal against a ruling, as distinct from an order, made by the lower court. However, we are here concerned more specifically with the provisions of the Criminal Procedure Code. Section 173(f) of the Criminal Procedure Code provides that if, upon taking all the evidence referred to earlier in the section, the court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the court shall record an order of acquittal. It is to be noted that the word "order" has been expressly used in this paragraph so that if an appeal is brought against such an order it would seem quite clear that it is an appeal brought against an order of the lower court within the ambit of section 307(i) of the Criminal Procedure Code because such an appeal would be one against a final order which, in so far as the lower court is concerned, brought the criminal proceedings to an end. That is not so in a case where the lower court rules that there is a case for the accused to answer. In such circumstances the trial would have proceeded and the defence called.

In relation to trials before the High Court without assessors, section 180 of the Criminal Procedure Code provides that when a case for the prosecution is concluded the court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal, or, if it does not so find, shall "call on" the accused to enter on his defence. The word "order" is not used in the section where the High Court finds that there is a case for the accused to answer. In such circumstances the court shall "call on" the accused to enter his defence. There is no equivalent express provisions in the Code relating to trials before a Magistrate's Court corresponding to the provisions of section 180 of the Criminal Procedure Code but in my judgment having regard to the provisions of section 173(f) of the Code it is implicit that the same situation would exist where a Magistrate's Court finds at the end of the case for the prosecution that there is a case for the accused to answer, in which event the court would call on the accused to enter on his defence.

For the reasons given therefore, I do not consider that the subject-matter of appeal here is one against any order made by the lower court within the scope of section 307(i) of the Criminal Procedure Code. Accordingly, I find that the instant appeal has been brought prematurely and it is not competent for this court to deal with such an appeal on its merits. I would also hold that the ruling made by the magistrate in the lower court is procedural in nature and that being so, it falls within the same class of ruling which was the subject-matter of the decisions of the High Courts respectively in Singapore and West Malaysia in the cases cited by learned Deputy Public Prosecutor, namely, the cases of *Public Prosecutor* v. *Hoo Chang Chwen*[1] and *Public Prosecutor* v. *R.K. Menon & Anor.*[2] Accordingly, also on this ground, I hold that the appeal is premature and does not constitute an appeal within the ambit of section 307(i) of the Criminal Procedure Code. Accordingly, for the reasons given, the appeal is dismissed.

The question that remains to be considered is what is to be done in the circumstances. The trial magistrate has left the service and it is therefore not competent for him to continue with the hearing of the trial against the appellant. The learned Deputy Public Prosecutor has expressed no opinion on the matter whereas learned counsel for the appellant expressed the view that in all fairness to the appellant the trial should continue from where it left off. I have considered the possibility of ordering a retrial in the circumstances but since there is express provisions contained in the Criminal Procedure Code to deal with circumstances such as this I think I shall invoke the provisions of section 261 of the Criminal Procedure Code and merely make an order that the trial shall continue from the stage where it left off, before the successor of the magistrate who initially heard the trial and who has since left the service. The provisions of that section confer a discretion upon the succeeding magistrate either to act on the evidence recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the trial, subject to the provisoes contained therein.

*Order accordingly.*

Solicitors: *Ong & Tiong.*